Filed 12/12/08 In re Antonio A. CA4/1

**NOT TO BE PUBLISHED IN OFFICIAL REPORTS**



COURT OF APPEAL, FOURTH APPELLATE DISTRICT

DIVISION ONE

STATE OF CALIFORNIA

| | |
|---|---|
| In re ANTONIO A., a Person Coming Under the Juvenile Court Law. | |
| SAN DIEGO COUNTY HEALTH AND HUMAN SERVICES AGENCY,<br><br>Plaintiff and Respondent,<br><br>v.<br><br>D.A. et al.,<br><br>Defendant and Appellant. | D052620<br><br>(Super. Ct. No. J500777E) |

APPEALS from a judgment of the Superior Court of San Diego County, Michael Imhoff, Commissioner. Reversed and remanded with directions.

Tina G. and D.A. appeal the judgment terminating their parental rights over Antonio A. Tina contends the juvenile court abused its discretion by failing to continue the Welfare and Institutions Code section 366.26[1] and section 388 hearings and erred by

1 All further statutory references are to the Welfare and Institutions Code unless otherwise specified.

finding Antonio adoptable. She also contends the San Diego County Health and Human Services Agency (the Agency) failed to send notice as required by the Indian Child Welfare Act (ICWA) (25 U.S.C. § 1901 et seq.). D.A. contends the court erred by failing to find he was Antonio's presumed father. Tina and D.A. join in each others' contentions. We reverse and remand on the ICWA issue.

## BACKGROUND

Tina has a history of drug use and lost her parental rights to several children before Antonio was born in September 2006. Upon his birth, Tina began a voluntary services contract with the Agency. In March 2007 when Antonio was six months old, Tina left him with an acquaintance who had a history of drug use and no child care skills. Tina did not return for Antonio, who ended up sleeping in a car seat in a urine-soaked diaper. The Agency filed a dependency petition based on the above facts. Antonio was detained in Polinsky Children's Center and then detained and placed in three foster homes. In November he was moved to the home of a family who wishes to adopt him. The section 366.26 hearing took place in February 2008.

## CONTINUANCE

Tina contends the juvenile court abused its discretion by failing to continue the February 2008 section 366.26 and section 388 hearings while she was out of town attending to a family medical emergency.

The jurisdictional and dispositional hearing occurred in June 2007. Tina did not appear. Her attorney did not know the reason for her absence and asked for a continuance. The court denied the request, declared Antonio a dependent, and denied

reunification services because Tina had not made reasonable efforts to resolve the issues that led to the removal of her older children—substance abuse, mental illness, criminal acts and physical abuse of a child. The court set a section 366.26 hearing for October. In September this court denied Tina's writ petition challenging the denial of services.

In October 2007 Tina filed a section 388 petition requesting that the June order be modified by giving her services and unsupervised visitation or allowing Antonio's placement with her or a relative. The juvenile court set a hearing on the section 388 petition for later that month and set a contested section 366.26 hearing for December. In October it continued the section 388 matter to November at Tina's request. In November it set an evidentiary hearing on the section 388 petition to coincide with the section 366.26 hearing. In December it continued the trial to February 4, 2008, because the Agency's counsel had a family emergency.

Tina was not present when court convened at 1:30 p.m. on February 4, 2008. Her attorney asked that the hearing be continued, stating that placement with the maternal grandmother was an issue and a continuance was necessary so that she and Tina could be present to testify. Counsel stated that Tina had called her "late last week" to say that she was going to Las Vegas to visit her brother who was very ill with cancer. Counsel stated that the maternal grandmother was on her way home from Las Vegas but could not be back in time for the hearing. D.A.'s attorney joined in the continuance request. Antonio's counsel opposed the request, arguing that it was in Antonio's best interests to have the matter resolved as soon as possible. The Agency's counsel also opposed the request,

arguing that Antonio needed permanence and stability, Tina was on notice of the trial date and the Agency had denied placement with the maternal grandmother.

During a recess, counsel called Tina's cellular telephone and left a message. When the hearing reconvened, the court denied the continuance request, noting that Antonio was very young and needed stability and there was no information why Tina and the maternal grandmother could not have returned in time for trial. The court trailed the matter to give Tina a chance to call and participate in the trial by telephone. Counsel telephoned Tina again. By 3:00 p.m. Tina had not called back. Counsel renewed the continuance request. Thereafter, the court conducted a *Marsden* hearing (*People v. Marsden* (1970) 2 Cal.3d 118) for D.A. By the time that hearing concluded, Tina still had not called back. The court again denied the continuance request. In closing argument, Tina's attorney asked for a continuance to address ICWA, to follow up with D.A.'s. paternity test and to allow Tina to testify regarding section 366.26 issues. The court denied the request for the reasons it had stated earlier.

We review the denial of a continuance for abuse of discretion and find none here. (*In re Ninfa S.* (1998) 62 Cal.App.4th 808, 811.) Continuances are discouraged in dependency cases. (*Id.* at pp. 810-811.) "[N]o continuance shall be granted that is contrary to the interest of the minor. In considering the minor's interests, the court shall give substantial weight to a minor's need for prompt resolution of his or her custody status, the need to provide children with stable environments, and the damage to a minor of prolonged temporary placements. [¶] Continuances shall be granted only upon a showing of good cause . . . ." (§ 352, subd. (a).)

Here, nearly four months had elapsed since the date originally set for the section 366.26 hearing. The court had already granted Tina a continuance of the section 388 hearing and the Agency a continuance of the combined section 388 and section 366.26 hearing. Tina argues that "the court knew the continuance would be very short, perhaps only one day." Trial counsel, however, did not specify a length for her proposed continuance or say when Tina and the maternal grandmother might make themselves available.

Tina contends that her testimony and that of the maternal grandmother was necessary for the court to make an informed decision on the section 388 issues of services and placement and on the section 366.26 issue whether Tina qualified for the beneficial relationship exception to termination of parental rights (§ 366.26, subd. (c)(1)(B)(i)). We disagree.

Tina argues that she "had a good case for" the granting of her section 388 petition because she had enrolled in drug treatment, parenting classes, therapy and psychiatric counseling. The documentation attached to her petition revealed that she began psychiatric care in April 2006, therapy in July 2007, drug treatment in August and a parenting class in September. Tina did not complete drug treatment, however, and by December 2007, she had not attended the program for "a long time."

Tina also asserts that a continuance was necessary to allow the maternal grandmother to become a relative caretaker which would give her priority to adopt Antonio (§ 366.26, subd. (k)). A continuance for that purpose would necessarily have been lengthy. In August 2007 the Agency interviewed the maternal grandmother at

Tina's request. By late September the Agency had decided not to place Antonio with the maternal grandmother due to her significant mental health history, false statement that she had no criminal history, dissembling of her family situation and her lack of insight into Tina's problems. During the interview, the maternal grandmother did not ask for a visit with Antonio, yet admitted that she had seen him only five to 10 times and had not seen him for more than six months. There was no indication that her situation had changed.

Finally, the record clearly shows that Tina would have been unable to prove the beneficial relationship exception. Her visitation with Antonio was sporadic, her interaction with him at times inappropriate and he demonstrated no attachment to her.

The court did not abuse its discretion by denying Tina's continuance request.

ADOPTABILITY

An adoptability finding requires "clear and convincing evidence of the likelihood that adoption will be realized within a reasonable time." (*In re Zeth S.* (2003) 31 Cal.4th 396, 406, citing *In re Jennilee T.* (1992) 3 Cal.App.4th 212, 223.) The Agency bore the burden of proof on this issue. (*In re Gregory A.* (2005) 126 Cal.App.4th 1554, 1557, 1559-1561.) A finding of general adoptability "focuses on the minor, e.g., whether the minor's age, physical condition, and emotional state make it difficult to find a person willing to adopt the minor." (*In re Sarah M.* (1994) 22 Cal.App.4th 1642, 1649, italics omitted.) An adoptability finding does not require "that the minor already be in a potential adoptive home or that there be a proposed adoptive parent 'waiting in the wings.' [Citations.]" (*Ibid.*) Here, there is substantial evidence supporting the adoptability

finding. (*In re Josue G.* (2003) 106 Cal.App.4th 725, 732; *In re J.I.* (2003) 108 Cal.App.4th 903, 911; *In re Lukas B.* (2000) 79 Cal.App.4th 1145, 1154.)

Tina first challenges the adoptability finding insofar as it was based on Antonio's foster family's desire to adopt him. She asserts that he was placed in three foster homes; his third foster parent was initially not interested in adopting; there was no information why she later changed her mind; and there was an insufficient assessment of her eligibility and commitment to adopt, her social and criminal history, her ability to meet Antonio's needs and their relationship (§ 361.5, subd. (g)).

Tina's premise is mistaken. Antonio lived in four foster homes, and it was the fourth family who wished to adopt him. The first foster parent, with whom he lived for a short time in April 2007, requested his removal after Tina lay on top of Antonio at a visit. The second foster parent, with whom Antonio lived until June, requested his removal because she was unable to deal with his gastro esophageal reflux disease (GERD)-related spitting up. The GERD later resolved. The third foster parent enjoyed having Antonio in her home but felt that she was too young to adopt. The fourth foster family met Antonio while he was placed in the third foster home and "fell in love" with him. In November he was moved to the fourth foster family's home in Orange County. While the section 366.26 report was filed before the move and the record does not contain an assessment of the prospective adoptive parents, as foster parents they had "already been screened for the factors required in the assessment report." (*In re L. Y. L.* (2002) 101 Cal.App.4th 942, 956.) Moreover, they had completed a home study. In any event, questions about this

family's suitability to adopt are irrelevant in light of Antonio's general adoptability discussed below. (*In re T.S.* (2003) 113 Cal.App.4th 1323, 1329.)

Tina claims Antonio is not generally adoptable because the number of possible adoptive homes is limited by her bipolar disorder and schizophrenia and a family history of bipolar disorder. We disagree. The prospective adoptive family's willingness to adopt him "generally indicates [he] is likely to be adopted within a reasonable time either by the[m] or by some other family." (*In re Sarah M., supra,* 22 Cal.App.4th at p. 1650, italics omitted.) Furthermore, while psychological, behavioral, and possible developmental problems may make it more difficult to find adoptive homes, they do not necessarily preclude an adoptability finding. (*In re Lukas B., supra,* 79 Cal.App.4th at p. 1154; *In re Jennilee T., supra,* 3 Cal.App.4th at pp. 224-225.) At the time of the section 366.26 hearing, Antonio was just 16 months old. He was thriving in his placement, generally healthy, sociable, engaging and loving. An evaluation revealed that his development was in the average to high-average range. The social worker believed that "he would likely make a welcome addition to any family." The social worker acknowledged that Tina's bipolar disorder and schizophrenia and family history of bipolar disorder limited the number of potential adoptive homes, but noted that in addition to the prospective adoptive home in Orange County, there was one home in San Diego County "that would accept Antonio for adoptive placement given his background and characteristics" and "at least 10 families in California who would accept a child with Antonio's characteristics."

Construing the record in the light most favorable to the judgment (*In re Josue G., supra,* 106 Cal.App.4th at p. 732; *In re J.I., supra*, 108 Cal.App.4th at p. 911), we conclude that the juvenile court did not err by finding Antonio adoptable.

PATERNITY

D.A. contends that the finding that he was not Antonio's presumed father is unsupported by substantial evidence. D.A. asserts that he received Antonio into his home and openly held him out as his child within the meaning of Family Code section 7611, subdivision (d).

Tina and D.A. were unmarried but had dated for 20 years. D.A. has a long criminal history. He was not present at Antonio's birth and did not sign a paternity declaration although Tina told him that he was the father. Antonio bears D.A.'s surname although D.A. is not named as the father on the birth certificate. D.A. lived with Antonio for just a short time preceding Antonio's March 24, 2007 detention. Tina claimed that D.A. lived with Antonio beginning in January 2007 and D.A. said the date was January 21. According to the section 366.26 report, D.A. did not begin living with Antonio until February. In any event, D.A. lived with Antonio for fewer than three months.

D.A. first appeared in court in April 2007 and the juvenile court appointed counsel for him. Counsel asked for paternity testing. The court granted the request, found that D.A. was an alleged father,[2] and allowed him supervised visits. In his paternity

---

[2] D.A. contends that "[t]he juvenile court originally found [he] was Antonio's alleged father because he requested paternity testing" and asserts that "[t]his decision was not supported by the law." It is too late for D.A. to challenge this finding. Furthermore,

questionnaire, D.A. said that he had agreed to be listed as the father on the birth certificate, had supported Antonio with "emotional day[-]to[-]day care," but had done nothing else to claim Antonio as his child. He also declared that he had not told anyone that he was the father and questioned whether he was the father, citing his incarceration "for a period of time."

D.A. did not attend the next hearing in May 2007. His attorney told the court that D.A. had missed the paternity test date and asked for a new date. The court granted the request. D.A. missed the second test date. In August he told the social worker that he wanted a third test date. The social worker told him to talk to his attorney and gave him counsel's contact information.[3] In November D.A. again told the social worker that he wanted a paternity test. The social worker gave him the laboratory's contact information. When the social worker followed up with D.A., he said he had not made a test appointment. The social worker then scheduled a December appointment for D.A. He

---

the record does not support D.A.'s premise that the court made the finding simply because he requested testing.

3 D.A. contends that after June 2007, his trial attorney did not assist him in attaining presumed father status. As support for this contention, he cites his statements at a *Marsden* hearing that took place during the section 366.26 hearing. At the *Marsden* hearing, D.A. complained that his attorney never spoke to him, advised him of his rights, informed him what was occurring or the consequences or told him how he should proceed. He also claimed that counsel told him it was "too late." The court denied the *Marsden* motion. D.A. does not contest the denial.

We need not consider this contention as it was raised for the first time in his reply brief. (*In re Tiffany Y.* (1990) 223 Cal.App.3d 298, 302.) Moreover, aside from D.A.'s complaints at the *Marsden* hearing, there is no indication in the record that counsel failed to assist him in attaining presumed father status and thus we reject the contention.

did not appear for the appointment. A few days later, the court granted the request of D.A.'s counsel that he be tested in custody.

By the time of the February 2008 section 366.26 hearing, D.A. had not been tested. His attorney requested presumed father status for D.A. Counsel made an offer of proof that D.A. "misunderstood several portions" of the paternity questionnaire, believed that he was Antonio's father and told relatives that he was the father when he was living with Tina and Antonio. After hearing argument, the court denied the request.

D.A. had the burden of establishing presumed father status by a preponderance of evidence. (*In re Spencer W.* (1996) 48 Cal.App.4th 1647, 1652-1653.) "California law provides that a man is presumed to be the father of a child if he 'receives the child into his home and openly holds out the child as his natural child.' " (*Id*. at p. 1652, quoting Fam. Code, § 7611, subd. (d).) While D.A. was not required to be the biological father to achieve presumed father status (*In re Nicholas H.* (2002) 28 Cal.4th 56, 63), the fact that he wished to confirm paternity, coupled with his failure to pursue testing in a timely manner, is a factor that the juvenile court was entitled to weigh in deciding the presumed father issue (see *In re Zacharia D.* (1993) 6 Cal.4th 435, 452). Likewise, the court was entitled to credit the statements in D.A.'s paternity questionnaire and give little weight to the later contrary offer of proof that he did not understand the questionnaire, believed that he was the father and told relatives that he was the father.

Moreover, there is scant evidence that D.A. received Antonio into his home and openly held him out as his child. (*In re T.R.* (2005) 132 Cal.App.4th 1202, 1211; *In re Sarah C.* (1992) 8 Cal.App.4th 964, 972-973, 977.) On his questionnaire, D.A. conceded

that he only lived with Antonio for two months. He was in and out of incarceration before and during this case and did not provide any evidence to support his claim that he had attended parenting and anger management classes in prison. He last saw Antonio in April 2007, and they never developed a significant relationship. Substantial evidence supports the finding that D.A. was not a presumed father. (*In re Spencer W., supra,* 48 Cal.App.4th at p. 1653.)

ICWA

In 2005 in the dependency case of Tina's daughter Marissa G., the Agency sent ICWA notices to the Blackfeet Tribe, the Seminole Indian Tribe (in Florida), the Seminole Nation of Oklahoma and the Bureau of Indian Affairs. All of the tribes responded that Marissa was not an Indian child. The juvenile court found that ICWA did not apply.

At the outset of Antonio's case in April 2007, the court relied on the information from the 2005 case and found that ICWA did not apply. In September 2007, Tina provided the social worker with additional information regarding Tina's Indian heritage. At the February 2008 section 366.26 hearing, the court reiterated its April 2007 finding that ICWA did not apply. Tina contends the information she provided in 2007 was not sent to the tribes in 2005 and the ICWA finding in Marissa's case was not dispositive in Antonio's case. The Agency contends the information Tina provided in 2007 did not differ significantly from the information sent in 2005 and ICWA notice was not required in Antonio's case.

The Indian heritage information in Marissa's case and the Indian heritage information in the instant case differed in material respects. In 2007, there was additional information about relatives who were identified in 2005, new information contradicting previous information about those relatives, and information about relatives who were unknown in 2005. The new facts about known relatives included the city of residence and telephone number of maternal grandmother Marion L. H.; maternal great-grandmother Mary L.'s birthplace; and the birth date, birthplace, former city of residence and affiliation with Seminole and Blackfeet tribes of another maternal great-grandmother, Yolanda F. The contradictory information included a different date of death for Yolanda. The newly identified relatives included maternal grandfather Wendell D., maternal great-grandfather Paul L. with his city of residence and year and state of birth, an unnamed maternal great-great-grandmother with her city of residence and the fact that she was "Seminole (full blood)," and an unnamed maternal great-great-grandfather with his city of residence and the fact that he was "Creole/Blackfoot."

The requirement for ICWA notice in a dependency case is implicated where there is reason to know that an Indian child is involved. (*In re Shane G.* (2008) 166 Cal.App.4th 1532, 1538-1539.) Whether the child is in fact an Indian child is a matter for the tribe 's decision after proper notice. (*In re Nikki R.* (2003) 106 Cal.App.4th 844, 848.) Here, there was significant new information bearing on the issue of Antonio's Indian heritage that was not included in the 2005 ICWA notices in Marissa's case. Thus, the tribes' responses in 2005 are not dispositive here, and ICWA notices were required for Antonio. We conclude that the ICWA finding must be reversed and the case remanded to

the juvenile court for proper ICWA notice. (*In re Francisco W.* (2006) 139 Cal.App.4th 695, 704-711.)

DISPOSITION

The judgment terminating parental rights is reversed and the case is remanded to the juvenile court with directions to order the Agency to comply with the notice provisions of ICWA. If, after proper notice, no tribe claims Antonio is an Indian child, the court shall reinstate the judgment. If, on the other hand, a tribe claims Antonio is an Indian child, the juvenile court shall proceed in conformity with ICWA.

HALLER, J.

WE CONCUR:

McCONNELL, P. J.

IRION, J.